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No. 01-252

In the Supreme Court of the United States

JERRY GOETZ, DBA JERRY GOETZ AND SONS,
PETITIONER

v.

DEPARTMENT OF AGRICULTURE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record

ROBERT D. MCCALLUM, JR.
Assistant Attorney General

DOUGLAS N. LETTER
SUSHMA SONI
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the Court should grant the petition for a writ of certiorari, vacate the judgment of the court of appeals, and remand the case for consideration of the constitutionality of the assessments imposed under the Beef Promotion and Research Act of 1985, 7 U.S.C. 2901 *et seq.*, in light of *United States* v. *United Foods, Inc.*, 121 S. Ct. 2334 (2001).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A14) is not yet reported. The opinion of the district court (Pet. App. F1-F22) is reported at 99 F. Supp. 2d 1308.

JURISDICTION

The judgment of the court of appeals was entered on April 20, 2001. On July 16, 2001, Justice Breyer extended the time within which to file a petition for a writ of certiorari to and including August 9, 2001, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress enacted the Beef Promotion and Research Act of 1985 (Beef Act), Pub. L. No. 99-198, Title

XVI, 99 Stat. 1597 (7 U.S.C. 2901 *et seq.*), to establish "a coordinated program of promotion and research designed to strengthen the beef industry's position in the marketplace and to maintain and expand domestic and foreign markets and uses for beef and beef products." 7 U.S.C. 2901(b). The Beef Act is the result of Congress's conclusion that "the maintenance and expansion of existing markets for beef and beef products are vital to the welfare of beef producers and those concerned with marketing, using, and producing beef products, as well as to the general economy of the Nation." 7 U.S.C. 2901(a)(4).

As directed by the Beef Act, the Secretary of Agriculture promulgated, after notice and comment, the Beef Promotion and Research Order (Beef Order). The Beef Order establishes two entities to conduct the promotion and research programs contemplated by the Beef Act: the Cattlemen's Beef Promotion and Research Board (Cattlemen's Board), composed of cattle producers and importers appointed by the Secretary, and the Beef Promotion Operating Committee (Operating Committee), composed of ten members of the Cattlemen's Board and ten members elected by a federation that includes qualified state beef councils. 7 U.S.C. 2903(a)-(b), 2904(1) and (4)(A); 7 C.F.R. 1260.141, 1260.161.[1]

The Operating Committee, on behalf of the Cattlemen's Board, develops and implements programs of "promotion and advertising, research, consumer

[1] A "qualified State beef council" is defined in the Beef Act as "a beef promotion entity that is authorized by State statute or is organized and operating within a State, that receives voluntary contributions and conducts beef promotion, research, and consumer information programs, and that is recognized by the Board as the beef promotion entity within such State." 7 U.S.C. 2902(14).

information, and industry information," subject to the approval of the Secretary. 7 U.S.C. 2904(4)(B); 7 C.F.R. 1260.168(d) and (e). Those programs are funded by a $1 per head assessment on all cattle sold in the United States or imported into the United States. The assessment is imposed on the cattle producer but is collected by the person who purchases the cattle from the producer. The assessment is remitted to the Cattlemen's Board or to a qualified state beef council (which, in turn, remits money to the Cattlemen's Board). 7 U.S.C. 2904(8)(A)-(C); 7 C.F.R. 1260.172(a)(1), 1260.310, 1260.311(a), 1260.312(c). The assessment cannot be used "in any manner for the purpose of influencing governmental action or policy, with the exception of recommending amendments to the [Beef Order]." 7 U.S.C. 2904(10); see 7 C.F.R. 1260.169(e) (implementing provision), 1260.181(b)(7) (state beef councils cannot use funds in a manner inconsistent with this provision).

On May 10, 1988, the Secretary, as required by the Beef Act, submitted the Beef Order to a nationwide referendum among cattle producers and importers. See 7 U.S.C. 2906(a). The Beef Order was approved by a majority vote. It remains in force today.[2]

The Secretary is authorized to investigate violations of the Beef Act and Beef Order, 7 U.S.C. 2909; to issue orders restraining or preventing such violations and to assess civil penalties of not more than $5000 per violation, 7 U.S.C. 2908(a); and to request that the Attorney General initiate civil enforcement actions in federal district court, 7 U.S.C. 2908(b) and (c).

2. Petitioner Jerry Goetz is a Kansas cattle producer, buyer, and trader who is subject to the assess-

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[2] The Secretary may conduct additional referenda upon the request of at least ten percent of cattle producers. 7 U.S.C. 2906(b).

ment and collection provisions of the Beef Act. On October 29, 1993, the Secretary initiated administrative proceedings against petitioner under 7 U.S.C. 2908(a) for violating the Beef Act and the Beef Order by failing to collect and remit assessments in connection with his purchases of cattle from producers and to submit reports on those transactions. Pet. App. F4-F5. In response, petitioner argued, among other things, that the Beef Act is unconstitutional. *Id.* at F4-F5.

On August 2, 1994, petitioner brought a separate suit in federal district court, contending that the Beef Act is beyond Congress's power to regulate interstate commerce, imposes an unconstitutional direct tax, impermissibly delegates legislative authority, and violates the First and Fifth Amendments. He sought a ruling that the Beef Act is unconstitutional, an injunction against enforcement of the Beef Act, and a refund of any unspent monies. Pet. App. B5-B6. The district court ordered an audit of petitioner's books and enjoined the administrative proceedings pending completion of the audit. *Id.* at B5.

On February 28, 1996, the district court rejected petitioner's constitutional challenges to the Beef Act, relying largely on *United States* v. *Frame*, 885 F.2d 1119 (3d Cir. 1989), cert. denied, 493 U.S. 1094 (1990), which had rejected similar constitutional challenges to the Beef Act. Pet. App. B1-B19. As is relevant here, the district court agreed with *Frame* that the Beef Act does not infringe beef producers' First Amendment rights. The district court reasoned that the governmental interests served by the Beef Act are "compelling" and "ideologically neutral," that those interests "cannot be achieved through means significantly less restrictive of free speech or associational freedoms," and that any infringement of those freedoms is "slight."

Id. at B17-B18. The court therefore set aside its prior orders that had enjoined and stayed the administrative proceedings that were pending against petitioner. *Id.* at B19.

The Tenth Circuit affirmed. Pet. App. C1-C17 (149 F.3d 1131). The court of appeals held that petitioner's First Amendment challenge was foreclosed by this Court's intervening decision in *Glickman* v. *Wileman Brothers & Elliott, Inc.*, 521 U.S. 457 (1997). The court of appeals understood *Wileman Brothers* to hold that no First Amendment issue is presented by assessments to support generic advertising programs for agricultural products. Pet. App. C15-C17. This Court denied certiorari. 525 U.S. 1102 (1999).

3. In the meantime, on February 26, 1997, the administrative law judge (ALJ) issued a decision and order in the administrative proceeding, which had resumed after the district court lifted its injunction. The ALJ concluded that petitioner had failed to meet his obligations under the Beef Act to collect and remit assessments from cattle producers, to pay late charges on the unremitted assessments, and to transmit monthly reports. The ALJ ordered petitioner to pay past-due assessments, late fees, and civil penalties. Pet. App. D3-D4, D29.

Petitioner appealed to the Judicial Officer, the final deciding officer in the Department of Agriculture's adjudicatory proceedings. The Judicial Officer, relying on *Wileman Brothers*, rejected petitioner's First Amendment challenge, modified the amounts of the past-due assessments, late fees, and civil penalties, and otherwise affirmed the ALJ's decision and order. Pet. App. D4-D5, D29-D36. On cross-motions for reconsideration, the Judicial Officer further modified the amount of money due in favor of the government, while denying

the relief sought by petitioner. Petitioner was ordered to pay $66,913 in assessments that he had failed to remit and late payment charges on those assessments, as well as $69,804.89 in civil penalties based on those violations of the Beef Act and on his failure to submit reports. *Id.* at E24-E25.

Petitioner sought review in the district court, asserting various challenges to the assessments. On May 23, 2000, the district court upheld the Judicial Officer in all respects. Pet. App. F10-F22.

Petitioner appealed to the Tenth Circuit. On April 20, 2001, the court of appeals affirmed. Pet. App. A1-A14.

DISCUSSION

Petitioner requests (Pet. 15) that the Court grant the petition for a writ of certiorari, vacate the judgment of the court of appeals, and remand the case for further consideration in light of *United States* v. *United Foods, Inc.*, 121 S. Ct. 2334 (2001).[3] That disposition would be inappropriate because the First Amendment question that petitioner now seeks to raise was neither pressed nor passed upon by in the court of appeals in this case, and because petitioner's First Amendment claim is different from the one in *United Foods*, is without merit, and would not warrant review even if it were properly presented.

1. In *United Foods*, the Court declined to extend *Glickman* v. *Wileman Brothers & Elliott, Inc.*, 521 U.S. 457 (1997), to the assessments imposed under the Mushroom Promotion, Research, and Consumer Information

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[3] Petitioner does not seek plenary review in this Court of the constitutionality of the assessments imposed under the Beef Act. Nor would such review be appropriate in the circumstances of this case.

Act of 1990 (Mushroom Act), Subtitle B of Title XIX of the Agricultural Promotion Programs Act of 1990, Pub. L. No. 101-624, §§ 1921-1933, 104 Stat. 3854-3865 (7 U.S.C. 6101 *et seq.*). As noted above, in the case brought by petitioner against the Secretary of Agriculture to enjoin the same administrative proceedings that culminated in the final agency order at issue here, the court of appeals relied on *Wileman Brothers* to reject a First Amendment challenge to the assessments imposed under the Beef Act. See *Goetz* v. *Glickman*, 149 F.3d 1131 (10th Cir. 1998), cert. denied, 525 U.S. 1102 (1999). Pet. App. C1-C19.[4]

The Court's decision in *United Foods* does not purport to address the constitutionality of the assessments imposed under other statutes, such as the Beef Act, that are textually similar to the Mushroom Act but that involve commodities that may be regulated differently in other respects. Nor does *United Foods* address other possible grounds for sustaining assessments imposed under the Mushroom Act and similar statutes against a First Amendment challenge. See *United Foods*, 121 S. Ct. at 2337-2338 (declining to address whether the assessments could be sustained under the standard announced in *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U.S. 557 (1980)); *id.* at 2341 (declining to address whether the assessments could be sustained as part of a program of government speech); see also *United States* v. *Frame*, 885 F.2d 1119 (3d Cir. 1989) (upholding Beef

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[4] The administrative proceedings concerned purchases of cattle that petitioner made between October 1, 1986, and June 30, 1994, before petitioner filed his action challenging the constitutionality of the Beef Act. Pet. App. F6.

Act assessments under strict scrutiny standard), cert. denied, 493 U.S. 1094 (1990).

2. Petitioner may not properly raise a First Amendment challenge to the Beef Act based on *United Foods* in the context of this case, and there is, in any event, no equitable justification for the Court to exercise its discretionary certiorari jurisdiction to allow petitioner to inject a constitutional issue into the case at this late stage.

First, the incidence of an assessment under the Beef Act is on the cattle producer, not the person who purchases cattle from the producer. See 7 U.S.C. 2904(8)(A) and (C). The purchaser simply collects the assessment from the producer and remits it to the Cattlemen's Board or a qualified state beef council. See p. 3, *supra*. The administrative order that petitioner challenges in this case was based not on his failure to *pay* assessments on cattle that he produced and sold, but on his failure to *collect* and *remit* assessments from producers from whom he purchased cattle and to submit reports of those transactions. See Pet. App. D29, D32. While any of the individual producers from whom petitioner purchased cattle presumably could have raised a First Amendment challenge to paying the assessments if they objected to the use of their funds for an advertising or promotion program, petitioner had no comparable First Amendment right to refuse to comply with his distinct statutory duties to collect and remit assessments from those producers and to submit reports of those transactions. See *id.* at D32 (Judicial Officer observes that "[t]he requirement that [petitioner] collect assessments from others and remit those assessments to a qualified State beef council does not reduce resources available to [petitioner] to conduct his own advertising or communicate other messages.").

Whatever may be the force of petitioner's First Amendment claim as an abstract matter, however, the important point for present purposes is that nothing in *United Foods* suggests that a person who merely serves as an agent or conduit for the collection and remission of assessments paid by others has a valid First Amendment objection to performing that role, even if the payors themselves would have a valid First Amendment objection to certain uses of their funds. For that reason alone, the Court's decision in *United Foods* does not furnish a basis for a remand to the court of appeals. Indeed, petitioner does not point to a conflict with any decision of this Court or another court of appeals with respect to whether a mere collector of payments has a valid First Amendment claim.

Second, although petitioner raised a First Amendment claim in the underlying administrative proceedings, he did not raise such a claim in the district court or the court of appeals on judicial review of the final administrative order. See Pet. App. A3-A4 (identifying issues presented to court of appeals); Pet. C.A. Br. 3-4 (same); Pet. App. F8 (identifying issues presented to district court). Nor did the court of appeals address the First Amendment question *sua sponte*. "Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them." *Pennsylvania Dep't of Corrections* v. *Yeskey*, 524 U.S. 206, 212-213 (1998); *Delta Air Lines, Inc.* v. *August*, 450 U.S. 346, 362 (1981) (a question that was not raised in the court of appeals, although raised in the petition for certiorari, "is not properly before us"); see generally *United States* v. *Williams*, 504 U.S. 36, 43-45 & n.4 (1992).

Third, as noted above, petitioner previously raised a constitutional challenge to the underlying administra-

tive proceedings, and the Tenth Circuit rejected that challenge, relying on *Wileman Brothers*. See Pet. App. C1, C15-C17. Any challenge to the constitutionality of the Beef Act on judicial review of the final order entered in those same administrative proceedings would have been barred not only by circuit precedent resulting from petitioner's prior appeal, as petitioner concedes (Pet. 10), but also by the res judicata effect of the Tenth Circuit's judgment on that appeal. And as noted above, such a challenge would have been without merit in any event, because the First Amendment afforded petitioner no right to avoid his statutory duties to collect and remit assessments due from others (the producers who sold him cattle) and to file reports on those transactions. Those obstacles may well explain petitioner's failure to renew his constitutional challenge to the Beef Act when he sought judicial review of the final administrative order in this case. Although those obstacles may explain petitioner's procedural default, however, they do not excuse it. Indeed, petitioner's failure to preserve the issue in the Tenth Circuit in this case is especially difficult to excuse in light of the fact that this Court granted certiorari in *United Foods*, on which petitioner now relies, on November 27, 2000 (see 531 U.S. 1009), almost six months before the Tenth Circuit rendered its decision in this case.

Fourth, the court of appeals' decision in this case simply sustains an administrative order requiring petitioner to remit assessments, make late payments, and pay civil penalties based on *past* transactions. Those transactions occurred before the Tenth Circuit rendered its prior decision on the constitutionality of the Beef Act—a decision that would properly have been given res judicata effect in this case if petitioner had

raised his constitutional claim in a timely manner. Petitioner has not sought to vacate the final judgment in his earlier case. Nor would *United Foods* provide a basis for doing so. A change in decisional law ordinarily is not regarded as a sufficient circumstance to warrant relief from a final judgment, especially one that requires the payment of money based on past conduct. See *Miller* v. *French*, 530 U.S. 327, 344 (2000); *Agostini* v. *Felton*, 521 U.S. 203, 239 (1997); see also *James B. Beam Distilling Co.* v. *Georgia*, 501 U.S. 529, 541 (1991) (opinion of Souter, J.) ("[O]nce suit is barred by res judicata or by statutes of limitation or repose, a new rule cannot reopen the door already closed."). For similar reasons, there is no justification at this late date for relieving petitioner of the res judicata effect of the Tenth Circuit's prior judgment on his obligation in this case to make monetary payments based on past transactions. See *Chicot County Drainage Dist.* v. *Baxter State Bank*, 308 U.S. 371, 374 (1940).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

ROBERT D. MCCALLUM, JR.
Assistant Attorney General

DOUGLAS N. LETTER
SUSHMA SONI
Attorneys

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